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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. RONALD EDWARD WOMACK, Defendant and Appellant.	C044372 (Super. Ct. No. CM016804)

The trial court resentenced defendant Ronald Edward Womack to 12 years in state prison after the Department of Corrections (DOC) questioned the original eight-year sentence. For a second time, the court denied defendant presentence credits.

On appeal, defendant argues the 12-year sentence violated his plea agreement. He seeks specific performance of the shorter term. Defendant also contends he is entitled to presentence credits and the trial court erred in admitting the prosecution's evidence on that issue. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Butte County Sheriff's deputies responded to a domestic disturbance in Magalia on the evening of November 16, 2001. They found the female victim upset and crying. Her left eye and cheek were red and swollen. The victim also had a small laceration on the left side of her forehead. She complained of pain on the back of her head and scalp.

The victim named defendant as the person who battered her. She told the deputies that she and defendant had dated for approximately three years and lived together at the Magalia address for one year of that time. They had broken up the month before but remained on speaking terms. The victim said she planned to have dinner with defendant earlier that evening. However, when defendant arrived, the victim noticed he had been drinking. She told the deputies she did not want to go to dinner with defendant because he became violent when drunk.

Defendant was angry that the victim broke their dinner date. When the victim walked into her bedroom closet, defendant followed and grabbed her by the hair. He pushed her into the closet wall and hit her in the face with his closed fist.

The defendant stopped his verbal and physical abuse when the victim's daughter arrived. The daughter realized what was happening and demanded that the defendant leave. When defendant told the victim to give him a ride to his car, she told him he could walk. The victim's daughter reached for the telephone. The defendant said if she called the police, he would "get [his]

ax and we can do this the hard way." The victim said she feared for her life. Her daughter gave defendant a ride. The victim called the sheriff's office as soon as they left the residence.

Butte County Sheriff's deputies arrested defendant on April 25, 2002. The information charged defendant with one count of corporal punishment on a former cohabitant (Pen. Code, § 273.5, subd. (a) -- count 1) and two counts of dissuading a witness by force or threat (§ 136.1, subd. (c)(1) -- counts 2 and 3).[1] It also alleged four prior serious felony convictions or "strikes."

On April 1, 2003, defendant pleaded guilty to one count of corporal punishment on a former cohabitant (count 1) and one count of dissuading a witness by force or threat (count 2). He also admitted one prior strike (§ 667, subds. (b)-(i)). Defendant acknowledged he had read, understood and agreed that he might serve a maximum sentence of 10 years under the plea agreement. The trial court dismissed count 3 of the information and struck the three remaining strikes.

At defendant's initial sentencing on June 2, 2003, the trial court denied probation and sentenced defendant to a total of eight years in prison consisting of: the middle term of six years on count 1, and one-third the middle term of six years on count 2, to be served consecutively. With respect to presentence credits, the probation report indicated defendant

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[1] Undesignated statutory references are to the Penal Code.

was on parole at the time of the current offense. It recounted the following conversation between the probation officer and parole officer: "The agent stated the defendant was last released on parole on September 24, 2000. The defendant's performance on parole has been 'poor,' and he has sustained two serious/violent violations. The agent stated the defendant's parole will be violated as a result of the instant case but not for issues surrounding this offense only. The defendant is also being violated for use of alcohol and absconding . . . ." The probation officer stated that defendant was "not entitled to custody time credits pursuant to *People v. Bruner* [(1995) 9 Cal.4th 1178 (*Bruner*)]." At the June 2003 sentencing hearing, the probation officer informed the court there was a parole hold on defendant at the time of the instant offense. Therefore, the court denied presentence credit.

Defendant filed a timely notice of appeal on June 19, 2003, in case No. CM016804 (C044372). Thereafter, the DOC alerted the trial court and counsel to what appeared to be errors in sentencing. The DOC noted that: (1) the sentencing range for conviction of section 273.5, subdivision (a) in count 1 was two, three or five years;[2] (2) the sentencing range for conviction of

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[2] The DOC is incorrect on this point. The sentencing range for conviction of section 273.5, subdivision (a) is two, three or four years. The two, four, or five-year range applies only where a defendant has suffered a prior conviction for an offense listed in section 273.5, subdivision (e), *within the last seven years*. Defendant admitted a May 1990 conviction for violating section 245, subdivision (a)(2).

section 136.1, subdivision (c)(1) in count 2 was two, three or four years, making one-third the middle term equal to one year; and (3) the trial court failed to sentence defendant to a full, consecutive, middle term in count 2 as required by section 1170.15.[3]

Appellate counsel moved to correct defendant's sentence and custody credits. At a hearing on March 8, 2004, the court resentenced defendant to a total of 12 years: the middle term of three years in count 1, doubled for the "strike," plus a full, consecutive, middle term of three years in count 2 pursuant to section 1170.15, doubled for the "strike." It again denied presentence credit, citing *Bruner*, *supra*, 9 Cal.4th at page 1191.

On March 11, 2004, defendant filed a second notice of appeal in case No. CM016804, which this court ordered lodged

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[3] Section 1170.15 provides: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, or of a felony violation of Section 653f that was committed to dissuade a witness or potential witness to the first felony, the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury.

under the same appellate case number as the first notice of appeal, C044372.

DISCUSSION

I

Defendant contends the 12-year term imposed at resentencing violated his plea agreement. Confirming on appeal that he does not want to withdraw his plea, defendant argues he is entitled to specific performance of the plea agreement -- for a sentence that satisfies the terms of the plea agreement and the sentencing guidelines. He suggests a reasonable remedy would be to sentence him to the lower term of two years, doubled to four years, on count 1, and a full, consecutive, low term of two years, doubled to four years, on count 2, for a total of eight years, resulting in the same aggregate term given at his original sentencing.

We conclude the 12-year sentence does violate the plea agreement. However, defendant's sole remedy is to withdraw his plea, which he declines to do.

It is the prosecutor's responsibility in a criminal action "to correctly advise, or make sure that the trial court correctly advises, the defendant of the permissible penalty scheme." (*People v. Velasquez* (1999) 69 Cal.App.4th 503, 507.) Moreover, "[t]he parties May not enter into a negotiated disposition, either by negligence or design, which specifies a sentence not authorized by law." (*Id.* at p. 505.) Here, it appears that at the time defendant agreed to the negotiated plea

in April 2003, everyone overlooked the fact that section 1170.15 required the full, consecutive, middle term in count 2.

Once defendant enters a guilty plea "in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment May not significantly exceed that which the parties agreed upon." *(People v. Walker* (1991) 54 Cal.3d 1013, 1024; § 1192.5.) We reject the People's claim that defendant did not "bargain" for a 10-year cap on his sentence, and conclude the increase to a 12-year term at resentencing significantly exceeded the agreed-upon maximum.

Remedies for breach of a plea agreement aim "to redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge. The remedy chosen will vary depending on the circumstances of each case. Factors to be considered include who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate. Due process does not compel that a particular remedy be applied in all cases." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860 (*Mancheno*).)

However, the preferred remedy for breach of a plea agreement is to allow defendant to withdraw the plea. (*People v. Calloway* (1981) 29 Cal.3d 666, 671; *People v. Kaanehe* (1977) 19 Cal.3d 1, 13-14 (*Kaanehe*.) "Specific enforcement of a particular agreed[-]upon disposition must be strictly limited because it is not intended that a defendant and prosecutor be able to bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion." (*Kaanehe*, *supra*, at p. 14.) Thus, "a defendant should not be entitled to enforce an agreement between himself and the prosecutor calling for a particular disposition against the trial court absent very special circumstances." (*Id.* at p. 13.)

In *Kaanehe*, the Supreme Court rejected the People's request for specific performance where there was a "substantial possibility" that the remedy would "not completely repair the harm caused by the prosecutor's breach and when the breach was willful and deliberate. . . ." (*Kaanehe, supra,* 19 Cal.3d at p. 14.) However, the Supreme Court found "very special circumstances" (*id.* at p. 13) in *Mancheno, supra,* 32 Cal.3d 855, where defendant's plea bargain incorporated his request for a diagnostic study by the DOC. (*Mancheno,* at p. 858.) The trial court sentenced defendant to four years in prison in accordance with the plea agreement but there was no mention of the term of the plea bargain calling for a diagnostic study. (*Id.* at p. 859.) On appeal, the Supreme Court explained that

"[s]pecific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances." (*Id.* at p. 861.) The *Mancheno* court held that specific performance was appropriate because ordering the diagnostic study "would not bind the trial judge to a disposition that he considered inappropriate, nor otherwise impinge upon his sentencing discretion. Indeed, enforcement would promote informed exercise of that discretion by providing the judge with further information with which to make an appropriate sentencing decision." (*Id.* at p. 864.)

Here, defendant cites no special circumstances to justify specific performance. Moreover, specific performance would improperly "bind[] the trial judge to a disposition that he or she considers unsuitable" under section 1170.15. (*Mancheno*, *supra*, 32 Cal.3d at p. 861.) Because defendant rejects the only available remedy by unequivocally declining to withdraw his plea, we shall affirm the 12-year sentence.

II

Section 2900.5, subdivision (a) provides that for all felony and misdemeanor convictions, the defendant shall receive credit against his sentence for all days spent in custody, including presentence custody. However, "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).) In *Bruner*, *supra*,

9 Cal.4th at pages 1193-1194, the Supreme Court held that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." The burden is on defendant to establish his entitlement to presentence custody credit. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258 (*Shabazz*).)

Defendant argues the trial court erred in denying him presentence credits because the record does not provide sufficient evidence that he was under a parole hold at the time he was arrested on April 25, 2002. He asserts he is entitled to 408 days of actual presentence credit and 204 days of conduct credit between the time of his arrest and the time he was sent to prison on June 6, 2003. Alternatively, defendant contends any parole hold arose out of this case alone since he was discharged from parole on December 30, 2002. Under the second scenario, defendant claims 158 days of actual presentence credit and 78 days of conduct credit. Defendant also maintains part of the prosecution's documentation on the subject of his parole hold was inadmissible hearsay.

Defendant attached to his motion to correct presentence custody credits the DOC certificate of discharge showing that he

was discharged from its jurisdiction on December 30, 2002.[4] He notes that the parole agent's statement that "defendant's parole *will be* violated as a result of [this] case," supports the inference that the agent had taken no action against defendant as of May 1, 2003. Defendant suggests the parole agent took no action because defendant had been discharged from parole in December 2002. Defendant also stresses there was no evidence the parole agent placed a parole hold on defendant before he was arrested on April 25, 2002.

At the resentencing hearing, the prosecutor acknowledged defendant's claim that there was no parole hold, but stated "[defendant] was in fact a parole absconsion (*sic*) . . . ." In addition to recounting the probation officer's conversation with defendant's parole agent, the probation report included the following information from the Butte County Sheriff's Office: "[Defendant] eluded law enforcement at the time of the incident. He continued to elude and evade law enforcement and his parole officers until finally being located and apprehended." At the hearing, the probation officer also presented "a faxed return from Parole," which the court made part of the trial record. The fax from "Chico Oroville Parole" indicated the following: (1) defendant was last released on parole on September 24, 2000; (2) his performance on parole was poor, having been involved in

[4] We denied defendant's request for judicial notice of defendant's certificate of discharge as the document was already in the record on appeal.

two serious/violent parole violations; (3) his parole was violated as a result of the present case; (4) his parole was not violated for issues surrounding this case only; (5) the additional sustained parole charges were use of alcohol, battery, terrorist threats and absconding.

Defendant asserts the trial court erred in admitting the fax into the record at the March 8, 2004 hearing. Although defendant argues on appeal that the fax was inadmissible hearsay that violated his right to confront and cross-examine witnesses, he failed to object to admission of the document on that ground. We reject the contention that his objection to the denial of presentence credits "by inference" constituted an objection to admission of the fax. Defendant forfeited his claim of evidentiary error by failing to object in the trial court. (Evid. Code, § 353, subd. (a); *People v. Avena* (1996) 13 Cal.4th 394, 426.)

The parties presented conflicting evidence on the question whether defendant was in custody for multiple, unrelated incidents of misconduct, and therefore not entitled to presentence credits. (*Bruner*, *supra*, 9 Cal.4th at pp. 1193-1194.) The information contained in the probation report and the fax from "Chico Oroville Parole" support the People's claim that defendant was held for reasons in addition to the charges in this case. Defendant, who had the burden of proving entitlement to presentence credits (*Shabazz, supra,* 107 Cal.App.4th at p. 1258), offered a DOC certificate of

discharge plus various written and oral representations by his appellate and trial attorneys. The trial court resolved the conflicting evidence against defendant. We presume its judgment is correct and will not reweigh that evidence on appeal. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 149, p. 396.)

DISPOSITION

The judgment (sentence of March 8, 2004) is affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

RAYE, J.